IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 2ND AUGUST 2007 / 11TH SRAVANA 1929

CRL.A.No. 890 of 2007(A)

SC.411/2001 of ADDITIONAL SESSIONS COURT (ABKARI CASES) KOTTARAKKARA

CP.224/2000 of JUDL.MAGISTRATE OF FIRST CLASS-II, KOTTARAKKARA

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APPELLANT: ACCUSED

ANIYAN KUNJU, C.NO.1503,
CENTRAL PRISON,
TRIVANDRUM.

BY ADV. ADV.K.K.RAJEEV(STATE BRIEF)

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 890 OF 2007

Dated this the 2nd day of August, 2007

JUDGMENT

The sole accused in S.C. No.411 of 2001 on the file of the Additional Sessions Court (Abkari Cases), Kottarakkara is the appellant. He faced trial for the offences punishable under Sections 55(a) read with Section 8(1) and (2) of the Abkari Act.

2. The prosecution allegation against the appellant - accused was that on 16.9.1998 at 5.20 p.m., the accused was found in possession of 6 litres of arrack in a 10 litre black plastic can. To prove the charge against the accused, the prosecution examined PWs.1 to 3 and produced Exts.P1 to P5 as well as MO.1 plastic can. No oral or documentary evidence was adduced on the side of the defence. On closing the prosecution evidence, the appellant was questioned under Section 313 Cr.P.C. He denied the prosecution allegation and stated that the case was foisted against him at the instance of one Balachandran Unnithan and Raveendran who were engaged in the sale of arrack. The trial court relied on the evidence adduced by the prosecution and found the appellant guilty under Sections 55(a) read with Section 8(1) and (2) of the Abkari Act, convicted him

thereunder and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of three months for the offence under Section 55(a) read with Section 8(1) of the Abkari Act. No separate sentence was awarded under Section 8(2) of thes Abkari Act. The benefit under Section 428 Cr.P.C. was also allowed to the accused. The above conviction and sentence are challenged in this appeal.

3. This appeal is filed through the jail authorities and hence, the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has raised the following contentions: (i) the trial court committed serious error in placing reliance on the evidence of PWs.1 to 3 who were official witnesses and there was no independent evidence to corroborate their versions, (ii) PW.1, the Circle Inspector, Excise had not followed the procedure prescribed under the provisions of the Abkari Act and the Kerala Excise Manual while conducting search and seizure as he had not sought the presence of any independent witness while preparing Ext.2 seizure mahazar, (iii) the finding of the trial court that the appellant

committed offence punishable under Section 55(a) of the Abkari Act is not legally sustainable as the prosecution had not proved that the contraband articles found in the possession of the appellant were in connection with export, import, transport or transit. To substantiate this contention, learned counsel relies on the decisions of this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631** and (iv) the evidence of PW.1 and 3 are contradictory to the statement in Ext.P2 regarding the colour of the cap of MO.1 can.

5. The trial court relied on the evidence of PWs.1 to 3 to find the appellant - accused guilty of the offence. PW.1 was the Excise Inspector, Excise Range, Chadayamangalam who detected the offence. He stated that while he was proceeding through Kottarakkara - Oyoor road and reached near the tea shop of one Raveendran, he saw the accused walking along the road holding MO.1 jerry can and that on seeing the excise party, he made an attempt to escape. He further stated that the accused was intercepted and questioned and on examining the jerry can, it was found to contain 6 litres of arrack. This witness further stated that he prepared Ext.P1 arrest memo and arrested the accused at the spot. He also stated that he took 300 ml of the contraband article as sample, sealed the sample bottle and the can and seized the same as per Ext.P2 seizure mahazar.

This witness further stated that the accused and the contraband articles were produced before the court below on 17.8.1998. PW.3 was the Preventive Officer who had accompanied PW.1 during the relevant time. He had corroborated the version given by PW.1. PW.2 who was the Excise Inspector stated that he visited the scene of occurrence, questioned the witnesses and recorded their statements.

6. Even though PW.1 stated in cross-examination that two witnesses were present at the scene of occurrence whose names were recorded in Ext.P2 mahazar, none of those witnesses were seen questioned or cited as witnesses before the court below. The only observation made by the court below in this regard was that one of the witness was reported dead and that the whereabouts of the other witness were not known. It is clear from the evidence adduced before the court below that PW.1 had not followed the procedure prescribed under the provisions of the Abkari Act and the Kerala Excise Manual while effecting search and seizure and taking the sample from MO.1 can. If Ext.P2 was prepared as per the provisions of the Abkari Act and the Kerala Excise Manual, the prosecution should have examined any one of the independent witness. According to the prosecution, the incident happened at a junction where the shop of Raveendran was situated which means that there were other persons present at the relevant time. Further, though it is stated in Ext.P2 mahazar

that MO.1 can was closed with a red cap, PW.3 stated that MO.1 can had a black cap. It has also come out in evidence that MO.1 can did not contain any label or seal. In this context, the case set up by the appellant when questioned under Section 313 Cr.P.C. assumes importance. The definite case of the appellant was that the case was foisted against him at the instance of one Balachandran Unnithan and Raveendran who were engaged in the sale of arrack. In the above circumstances, the case of the prosecution that PW.1 seized MO.1 can from the appellant is not supported by any legally acceptable evidence. The evidence of PW.3 appears to be contradictory to the version given by PW.1. Hence, the finding of the court below that the evidence of PWs.1 to 3 can be accepted is not justifiable.

7. The next point to be considered is regarding the finding of the court below that the appellant committed offence punishable under Section 55(a) read with Section 8(1) and (2) of the Abkari Act. It appears that the court below had not fully understood the provisions of Section 55(a) and Section 8(1) and (2) of the Abkari Act. The offences mentioned in Section 55 of the Abkari Act and those mentioned in Section 8(1) and (2) of the Abkari Act are entirely different. An offence under Section 55(a) of the Abkari Act should be proved by the prosecution by adducing evidence to the effect that possession of the contraband articles was in connection

with export, import, transport or transit. Mere possession of the contraband articles will not attract an offence under Section 55(a) of the Abkari Act. This point was considered by this Court in the decisions reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631.** In the case in hand, the prosecution had not proved that the appellant was in possession of the contraband articles in connection with export, import, transport or transit. In the above circumstances, this Court is inclined to accept the argument of the learned counsel appearing for the appellant that the prosecution failed to prove that the appellant committed offence punishable under Section 55(a) of the Abkari Act.

8. Another point to be decided is whether the appellant committed offence punishable under Section 8(1) and (2) of the Abkari Act. The prosecution case is that the appellant was found in possession of 6 litres of arrack. As per Section 8(1) of the Abkari Act, possession of arrack in any form is punishable under Section 8(2) of the Abkari Act.

9. This Court has already found that the evidence of PWs. 1 and 3 does not give confidence to hold that MO.1 plastic can was seized from the appellant as per the provisions of the Abkari Act and the Kerala Excise Manual. Hence, the evidence of those witness cannot be accepted to prove

the case against the appellant. The finding of the trial court that the appellant was found in possession of 6 litres of arrack, as alleged by the prosecution, is not based on any legally acceptable evidence. In the above circumstances, the impugned judgment is liable to be set aside. Accordingly, the impugned judgment is set aside and the appellant - accused in S.C. No.411 of 2001 on the file of the Additional Sessions Court (Abkari Cases), Kottarakkara is acquitted of the charges levelled against him. The appellant shall be released forthwith, if he is not wanted in connection with any other case.

The Crl. Appeal is accordingly allowed.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.APPEAL NO.890/2007

JUDGMENT

2ND AUGUST, 2007